IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.764 OF 2004

1.Atmaram Balkrishna Sonar & Anr. ..Petitioners.
Vs.
1.Mahadev Anna Dhole & Anr. ..Respondents.

Mr.Sharvani Shailendra i/b Mr. P.S.Dani, advs. for the Petitioners.

CORAM : J.H.BHATIA, J.
DATE : SEPTEMBER 19, 2007.

P.C.:

1. Heard the learned counsel for the Petitioner. None for the respondents though the respondent has been served and the notice has clearly indicated that this petition may be disposed off finally at the stage of admission.

2. The suit was filed by the respondents against the present petitioner for temporary injunction. That suit was dismissed and against that the respondent/plaintiff preferred an appeal. During that appeal, the present respondent/plaintiff sought an amendment in the plaint and prayer for partition and separate possession was made. After that amendment, suit was remanded back to the trial Court. After remand the matter was heard afresh and the suit was decreed. Against that decree, the defendant/present

petitioner preferred an appeal. Pending the appeal, the petitioner sought to amend grounds of appeal but that application was rejected. The learned Appellate Court observed that in view of Section 105(2) of the C.P.C., the objection could not be taken to the remand of the matter and, therefore, permission to amend the plaint could also not be challenged in appeal.

3. Section 96 provides for first appeal and Section 104 provides for orders from which appeal lies. Section 105 of the C.P.C. provides for other orders against which appeal does not lie. Section 105 of the C.P.C. reads as follows:

> 105.(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
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> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

The learned counsel contends that the appellant never challenged the order of remand nor the order of remand was tried to be disputed by making additional ground in appeal memo by making the amendment. It is contended

that even though in view of the provisions of first part of sub-section 1 of Section 105, no appeal is tenable against the permission granted to amend the plaint, under the second part of the said section, this may be objected to if the appellant can point out error, defect or irregularity in such order if it is going to affect the decision of the case.

4. In my opinion, the contention of the learned counsel for the petitioner is right. The learned Appellate Court should have allowed the petitioner/appellant to amend the grounds of the appeal and to add some more grounds.

5. In view of the above, petition is allowed. Impugned order rejecting application Exhibit 20 is hereby set aside and the amendment application exhibit 20 is hereby allowed.

[J.H.BHATIA, J.]